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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 217 52045

Office: VERMONT SERVICE CENTER

Date: JUL 28 2004

IN RE:

Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a new U.S. office operating a retail shoe store. The petitioner was incorporated in the State of New Jersey in April 2001 and began actual operations November 2001. The petition was filed June 13, 2002. It seeks to temporarily employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee. The director determined that the record did not demonstrate that the beneficiary had been or would be employed in a managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is functioning as the petitioner's chief executive officer. In addition, the general manager of the petitioner's parent company acknowledges that the petitioner initially submitted a condensed version of the beneficiary's duties for both the foreign entity and the United States entity. The general manager of the petitioner's parent company offers a more detailed description of the beneficiary's duties on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;
- (B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - c. the organizational structure of the foreign entity.

The first issue in this proceeding is whether the beneficiary was employed in the foreign entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially did not describe the beneficiary's position with the parent company. On June 21, 2002, the director requested: (1) a comprehensive description of the beneficiary's duties as manager for the foreign and United States company; (2) how the beneficiary's duties had been managerial or executive; (3) if the beneficiary had been managing a professional staff, a list of employees identifying each employee by

name, position title, and complete job description; and, (4) a breakdown of the number of hours devoted to each of the employees' job duties, including one for the beneficiary.

In response, the petitioner indicated that the beneficiary had been the foreign entity's marketing manager. The petitioner explained that the beneficiary and a marketing assistant coordinated activities with the store¹ supervisors, the store managers, and the sales persons. The petitioner indicated that the beneficiary's responsibilities included:

- Establish marketing objectives;
- Develop, in coordination with other managers, a marketing plan related to sales, advertisement, merchandising and purchases;
- Establish sale goals and review with store supervisors;
- Coordinate activities to motivate sales persons;
- Monitor sales daily and take action when necessary;
- Coordinate window displays, evaluate each store's presentation of product, coordinate in-store merchandising materials;
- Coordinate activities related to advertisements, promotion and sales campaigns, work with advertising agencies, marketing coordinator, suppliers, and store supervisors; and
- Buy product and work with suppliers with the purchasing team.

The director determined that the beneficiary's duties did not relate primarily to policy and general management, but rather, appeared to relate to the day-to-day operations involved in producing a product or providing a service. The director also observed that the petitioner had failed to submit complete job descriptions for the foreign employees.

On appeal, the general manager of the foreign entity provided a description of the foreign entity's organizational structure and the beneficiary's place in the organization's hierarchy. The general manager added to the beneficiary's responsibilities indicating that the beneficiary directed the marketing unit, evaluated the results of plans, strategies, and actions taken in the marketing unit, supervised and coordinated the store supervisor's activities and the communications activities, analyzed the customer's needs and store performance, and decided locations for new stores. The general manager also indicated that the beneficiary planned and evaluated the company's general activities in coordination with the administrative and general manager. The general manager submitted job descriptions for store supervisors, managers, and sales personnel and a job description for the position of communication assistant.

Upon review, the information provided by the general manager of the foreign entity, in large part, will not be reviewed. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO will not consider the description of the foreign entity's organizational structure and will not consider the descriptions of the foreign entity's employees, submitted for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

¹ The foreign entity operates 30 retail shoe stores and has 250 employees.

Likewise the addition to the beneficiary's duties, not mere elaboration or clarification to the duties originally described will not be considered for any purpose. *Matter of Soriano, supra*.

The general manager's description of the beneficiary's duties for the foreign entity, in response to the director's request for evidence, was not comprehensive and did not support a conclusion that the beneficiary would primarily perform managerial or executive tasks. The description was vague and nonspecific and failed to demonstrate what the beneficiary did on a day-to-day basis. For example, the foreign entity indicated that the beneficiary's duties included establishing marketing objectives and sales goals and coordinating presentation of the foreign entity's product and other activities related to advertisements, promotions and sales campaigns. The foreign entity, however, did not define the goals, or objectives and failed to clarify who actually provided the foreign entity's merchandising service. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In sum, the record does not contain sufficient evidence to establish that the beneficiary had been employed in a primarily managerial or executive position for the foreign entity.

The remaining issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition.

The petitioner again initially failed to describe the beneficiary's duties for the proposed position. On June 21, 2002, the director requested: (1) a comprehensive description of the beneficiary's duties as manager for the foreign and United States company; (2) how the beneficiary's duties had been managerial or executive; (3) a list of United States employees identifying each employee by name, position title, and complete job description; and, (4) a breakdown of the number of hours devoted to each of the employees' job duties, including one for the beneficiary.

In response, the foreign entity's general manager explained that (1) since the petitioner's store was recently opened, the beneficiary would "evaluate the market, study different locations, and open new stores in order to create a retail shoe stores chain;" (2) the beneficiary would hire all the suppliers, buy all of the store product including traveling to shoe fairs, coordinate delivery of merchandise, coordinate the financial activities of the petitioner, and would be responsible for the inventory and point of purchase systems; and, (3) the beneficiary's "basic responsibility is to make the business grow. She will be working as the general manager. Studying the opportunities of the markets, evaluating the marketing and sales plan, coordinating the financial activities [sic]."

The foreign entity's general manager also indicated that the petitioner employed a store manager and two full-time sales clerks and two part-time sales clerks. The petitioner provided payroll records substantiating the employment of these individuals in November 2001.

The director determined that the beneficiary's duties did not relate primarily to policy and general management, but rather, appeared to relate to the day-to-day operations involved in producing a product or

providing a service. The director also determined that the job descriptions provided were in abstract form and did not provide a level of complexity.

On appeal, the foreign entity's general manager stated that the beneficiary's duties and responsibilities are divided in two phases:

The first phase: the opening of the business, will involve both executive and operational activities; and the second phase: the direction of the company, will consist basically on [sic] performing managerial and executive activities and decisions.

The foreign entity's general manager provided: (1) a description of the beneficiary's duties during the first and second phases of operation; and (2) a description of the basic responsibilities of the store manager, sales clerks and stock persons job positions.

On review, neither the director nor counsel addressed the proper issue in this proceeding. Because the petitioner is a new office, the appropriate analysis is whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. It does not appear that the director considered the applicable regulation, 8 C.F.R. § 214.2(l)(3)(v). Therefore, the director's decision on this issue will be withdrawn, and the AAO will consider whether the beneficiary will be employed in the United States as a manager or executive within one year of approval of the petition.

Based on the evidence presented, the U.S. entity will not support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level, and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the present matter, the petitioner has not provided adequate documentation establishing that the U.S. entity will sufficiently support the beneficiary in a managerial or executive position within one year of approval of the petition. The documentation submitted by the petitioner regarding the new U.S. entity includes: the petitioner's 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return; transfer of funds from the parent company to the petitioner; an assignment of lease for the premises occupied; a trade mark application; and bank statements for a period from June 2001 through October 2001.

While the petitioner submitted evidence that the U.S. entity possesses premises and products to begin doing business in the United States, the above-listed documentation does not establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year of approval of the petition. The record does not contain a detailed business plan in which the company's policies, strategies, and financial

goals are clearly defined. Nor does the record include any evidence that the organizational hierarchy will expand beyond the two part-time and three full-time employees. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Also, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

Based on the evidence presented, the AAO cannot conclude that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

For the foregoing reasons, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.